

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LINDA HOLT)	
Claimant)	
VS.)	
)	Docket No. 201,229
CS INVESTMENTS, INC.)	
d/b/a/ DAD'S BAR AND GRILL)	
Respondent)	
AND)	
)	
UNKNOWN)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

The Kansas Workers Compensation Fund appeals from a preliminary hearing Order of April 16, 1996 wherein Administrative Law Judge John D. Clark denied the application of the Workers Compensation Fund and respondent to reconsider its previous order and to find claimant's claim to be noncompensable.

ISSUES

- (1) Whether certain defenses apply, including both intoxication and fainting.
- (2) Compensability of claimant's claim, including whether claimant's accidental injury arose out of and in the course of her employment. Respondent alleges claimant was not employed at the time of the accident.
- (3) Whether respondent's appeal was timely filed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purpose of preliminary hearing, the Appeals Board finds as follows:

In order to fully understand this matter a brief review of this case's litigation history is necessary. Claimant's original Form E-1 was filed on April 21, 1995 alleging a March 14, 1995 injury to claimant's left knee. The Form E-3 requesting preliminary hearing was filed by claimant on May 8, 1995. The original preliminary hearing occurred on August 10, 1995 with the claimant being denied benefits, having failed to prove coverage under the Workers Compensation Act. Respondent denied claimant was employed on the date of accident and raised claimant's intoxication as a second defense. This matter was appealed by the claimant in a timely fashion but shortly thereafter was voluntarily dismissed upon claimant's request.

Claimant filed a motion to reconsider and to extend its discovery time and appealed this matter, all on August 18, 1995. Claimant's request was intended to allow the taking of the deposition of Mr. Lemar Calbeck, the son of the deceased former owner of respondent. Claimant's request was overruled by the Administrative Law Judge in his Order of August 25, 1995. Nevertheless, the parties took the deposition of Mr. Calbeck on October 23, 1995. Claimant then filed a motion on November 29, 1995 requesting the right to present new evidence and to take a deposition duces tecum for purpose of admitting certain business records from respondent. This matter was noticed up for document deposition on December 19, 1995.

On January 18, 1996 a second motion to introduce records was filed by the claimant with the hearing scheduled for January 25, 1996. The hearing on January 25, 1996 involved only arguments of counsel with numerous documents placed into evidence. Up to this point in the litigation, the respondent (Dad's Bar and Grill) and the Workers Compensation Fund were the only parties listed as respondents. At the January 25, 1996 Motion Hearing claimant moved to amend its pleading to include CS Investments, Inc., d/b/a Dad's Bar and Grill as the appropriate respondent.

At the conclusion of the attorney arguments at the January hearing both the Workers Compensation Fund and the respondent, CS Investments Inc., d/b/a/ Dad's Bar and Grill, requested the right to present additional evidence regarding the issue of compensability. Neither request was addressed by the Administrative Law Judge at that time. The Administrative Law Judge then issued an Order dated January 25, 1996 granting benefits to claimant in the form of medical treatment and temporary total disability compensation. No appeal was taken from that Order.

The Fund then filed a Motion for Supplemental Hearing on February 8, 1996. The Notice of Hearing indicated the matter was scheduled for February 29, 1996. Claimant filed a response to the Fund's Motion for Supplemental Hearing arguing that all issues had been previously litigated and requesting the Fund be denied the right to re-open the matter.

Claimant filed its motion to amend its caption on February 28, 1996 to include CS Investments, Inc., d/b/a Dad's Bar and Grill.

On March 25, 1996, the Fund filed a Notice of Preliminary Hearing with said preliminary hearing scheduled for April 16, 1996.

At the preliminary hearing of April 16, 1996, the claimant objected to the proceedings, inquiring as to why this testimony was not presented at the original preliminary hearing. The claimant requested that the Court "stick by its original order." No additional objection was raised by claimant. The testimonies of two employees of respondent and one bar patron were taken at that time. The Court's Order of April 16, 1996 denied both the respondent and the Fund's application for reconsideration and further denied the request that the Court consider respondents request that this claim be held noncompensable.

Both claimant and the Fund have filed motions to reconsider, to extend discovery and for supplemental hearings. A Notice of Preliminary Hearing was also filed by respondent on March 25, 1996. The Appeals Board has held in the past there is no limit to the number of preliminary hearings which can be requested under the Workers Compensation Act. While the Appeals Board does not favor the re-litigation of issues based upon the same evidence, the introduction of new evidence at subsequent preliminary hearings should be allowed.

"The essential elements of due process of law in any judicial hearing are notice and an opportunity to be heard and defend in an orderly proceeding adapted to the nature of the case." Collins v. Kansas Milling Co., 207 Kan. 617, 620, 485 P. 2d 1343 (1971).

Claimant contends respondent's appeal should be dismissed as untimely as the Award granting benefits stems from the January 25, 1996 hearing. At that time both respondent and the Fund requested the opportunity to present additional evidence. This request was not addressed by the Administrative Law Judge and as no appeal was taken from that matter, the claimant is correct that any appeal from the January hearing would currently be untimely. However, the Board is not dealing with the January 25, 1996 hearing. This appeals stems from the April 16, 1996 Preliminary Hearing, from which a timely appeal was filed.

The Appeals Board has limited jurisdiction when reviewing findings from preliminary hearings. Either the disputed issue must be one specifically enumerated in K.S.A. 44-534a or the administrative law judge must have exceeded his jurisdiction in granting or denying benefits as required by K.S.A. 44-551. The enumerated issues in the preliminary hearing statute K.S.A. 44-534a are as follows: (1) whether the employee suffered an accidental injury, (2) whether the injury arose out of and in the course of the employee's employment, (3) whether notice was given or claim timely made, or (4) whether certain defenses apply. Respondent raises the defenses of intoxication and claimant's alleged fainting spell as proper in this matter. Respondent further asserts that claimant's accidental injury did not

arise out of and in the course of her employment as she was not working for the respondent at the time of the specific incident. The Appeals Board will address these issues individually.

Respondent's contention that claimant was intoxicated at the time of the injury is not supported by the evidence. Claimant testified to having consumed only one beer before the fall. Respondent's witnesses were able to verify the consumption by claimant of from one to five beers during claimant's time in the bar on the date of injury. No witnesses testified to claimant being intoxicated. The strongest testimony was that claimant was in a good mood at the time of the injury. The Appeals Board finds respondent's defense that claimant was intoxicated at the time of the incident is not supported by a preponderance of the credible evidence.

The Appeals Board must next address whether the evidence supports a denial of benefits based upon claimant fainting behind the bar.

In proceedings under the Workers Compensation Act the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions under which the claimant's right depends by a preponderance of the credible evidence. See K.S.A. 1996 Supp. 44-501 and K.S.A. 1996 Supp. 44-508(g).

While it is claimant's burden to prove her entitlement to benefits, when a defense under K.S.A. 44-534a, as amended by S.B. 649 (1996), is asserted the burden shifts to the party claiming benefit of this defense. In this case both the respondent and the Workers Compensation Fund contend claimant did not suffer accidental injury arising out of and in the course of her employment as, rather than suffering accidental injury, she simply fainted behind the bar. This contention is supported by the testimony of Mr. Kurt Farley, a regular patron of the bar. Mr. Farley stated on the date of accident he observed claimant walk behind the bar. Suddenly her eyes rolled in the back of her head, she turned grey and collapsed to the floor. He opined claimant was unconscious for approximately three minutes, an ambulance was called and she was transported to the hospital. He did not see any moisture on the floor nor did he see any indication that claimant slipped and fell on the day of the accident. Claimant contests this testimony, opining instead that she went to the cooler to fill an order for four bottles of Budweiser. When she opened up the cooler and turned around, she stepped in water and went down. She then stated her leg went back "like this and this", neither "this" being explained on the record and after that she remembered nothing, having passed out because of the pain. Claimant further testified that the floor behind the bar was a mess, covered with water, because the bartender on duty "wasn't doing anything."

Claimant had no history of fainting spells and apparently was not on any type of medication at the time of injury to explain her having fainted.

In workers compensation litigation the administrative law judge is in the enviable position to observe witnesses during in-person testimony. Both claimant and Mr. Farley testified before the Administrative Law Judge and, in assessing the evidence, the

Administrative Law Judge found claimant's testimony to be the more credible. Had this not been the case the Administrative Law Judge would have denied benefits to the claimant rather than granting same. The Appeals Board finds that the opportunity for the Administrative Law Judge to assess witness credibility is a factor to be considered for preliminary hearing purposes and gives credence to the Administrative Law Judge's decision in finding the claimant's version of the injury more credible. As such, the Appeals Board finds for preliminary hearing purposes claimant did not suffer a fainting spell behind the bar, but rather slipped on water, suffering accidental injury to her left knee.

The Appeals Board must next decide whether claimant was an employee of respondent at the time of the alleged injury. Claimant acknowledges she was not scheduled to work at the bar on the date of injury and, in fact, had been relaxing at the bar drinking beer prior to the incident. She was approached by the on-duty bartender who requested she watch the bar temporarily while he competed in a dart tournament. Claimant agreed and proceeded behind the bar. The parties agree the normal procedure in respondent's bar would be for the respondent to schedule the employees during specific designated shifts. Only certain persons had the authority to schedule these shifts and to authorize substitutions or replacements during the scheduled work time. Respondent's evidence indicates the bartender on duty the date of injury did not have the authority to authorize the substitutions of employees during shift times. Claimant acknowledges a sheet was maintained in the bar for the employees to sign during their designated workshifts. On the date of injury claimant did not sign this sheet. Claimant further acknowledges on the date of injury she was not paid during the time when she was injured. Respondent contends claimant was a volunteer, not scheduled to work at the time of the injury and not authorized by anyone of authority to work for the regularly scheduled bartender.

In order for a claimant to collect workers compensation benefits under the Kansas Workers Compensation Act she must suffer an injury arising out of and in the course of her employment.

The phrase "out of employment" points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises "out of" employment if it arises out of the nature, condition, obligations and incidents of the employment. Newman v. Bennett, 212 Kan. 562, 512 P.2d 497 (1973).

The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. Horman v. New Hampshire Ins. Co., 236 Kan. 190, 689 P. 2d 837 (1984).

The Appeals Board finds claimant's injury suffered on March 14, 1995, did arise out of claimant's employment as it was claimant's obligation to perform certain activities behind the bar, retrieving of beer for customers included.

The Appeals Board finds that the injury suffered by claimant on March 14, 1995, did not occur in the course of claimant's employment as the evidence does not support claimant's contention that claimant was at work in her employer's service at the time of injury. Claimant's presence behind the bar was apparently a voluntary activity performed for a friend. No one with authority requested or authorized claimant's employment. Therefore, it cannot be found that claimant's injury arose out of and in the course of her employment with respondent.

Therefore, the Appeals Board finds the Order of Administrative Law Judge John D. Clark dated April 16, 1996, should be reversed and claimant's claim should be found noncompensable.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge John D. Clark dated April 16, 1996, should be, and is hereby, reversed and claimant is denied benefits.

IT IS SO ORDERED.

Dated this ____ day of June 1996.

BOARD MEMBER

c: Mark T. Schoenhofer, Wichita, KS
James Cline, Wichita, KS
Dale V. Slape, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director